COURT OF APPEAL OF YUKON

Citation: *Yukon (Government of) v. Public Service Alliance of Canada*, 2015 YKCA 11

Date: 20150514
Whitehorse Docket: 13-YU744

Between:

Government of Yukon

Respondent
(Petitioner)

And

Public Service Alliance of Canada and Yukon Employees' Union

Appellants
(Respondents)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of Yukon, dated October 3, 2014 (*Yukon (Government of) v. Public Service Alliance of Canada*, 2014 YKSC 59, Whitehorse Docket 13-A0084).

Oral Reasons for Judgment

Counsel for the Appellant:	A. Astritis
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Place and Date of Hearing:	Vancouver, British Columbia May 12, 2015
Place and Date of Judgment:	Vancouver, British Columbia May 14, 2015

Summary:

Appeal from a judicial review setting aside a decision of the Classification Appeal Board. The appellant union sought to classify speech and language consultants as Consultants under the Education Group under section 18 of the Public Service Act. The Government of Yukon sought to classify the consultants under the Scientific and Technical Group. The Board found the consultants' best fit was under the Education Group. On judicial review, the judge held the Board failed to consider the entirety of the definition set out in both groups and remitted the matter back to the Board with specific instructions to consider all inclusive and exclusive criteria and to not consider any positions which are not official benchmark positions. On appeal, the union's principal argument is that the judge failed to consider reasons which could have been given to justify the Board's decision. HELD: appeal allowed. The Board's reasons provide justification for a decision that was open to it. Having found the decision was open to the Board, the judge erred in allowing judicial review and remitting the matter back to the Board. The decision of the Board is reinstated.

Introduction

[1] **WILLCOCK J.A.**: This is an appeal from an order, made for reasons indexed as 2014 YKSC 59, on a judicial review setting aside a decision of the Yukon Classification Appeal Board ("the Board").

[2] The Board decision was made pursuant to s. 34 of the *Public Service Act,* R.S.Y. 2002, c. 183 [the *Act*], on August 20, 2013. It addressed the appropriate occupational group designation of speech and language consultants to school-based personnel (the "SL Consultants"). Such a designation is made pursuant to s. 18 of the *Act* which requires the Public Service Commission to make classification plans that establish "one or more systems of classes, groups, and levels to which positions may be allocated". The classification plan in this case is set out in the Job Evaluation Manual, which contains a Job Evaluation Plan.

[3] The issue before the Board was whether the SL Consultants should be designated as members of the Consultant sub-group of the Education Group ("EC Group"), as they contended, or as members of the Scientific and Technical Group ("ST Group"), as the Government of Yukon contended. The Board determined that the major focus of the SL Consultants' work is assisting students in their educational

endeavours and in assisting school personnel in delivery of a professional service; accordingly, the SL Consultant position was found to belong to the Education Group.

[4] The Court ordered the matter remitted to the Board with directions that a new adjudicator consider all inclusive and exclusive criteria, and a direction that the adjudicator specifically *not consider* any positions which are not official benchmarks.

Procedural History

[5] The Union representing the SL Consultants brought the matter to the Board. Its submission was founded upon the job description appended as an exhibit to an affidavit sworn by the Manager of Classification of the Yukon Public Service Commission, which includes the following:

> **Section 2-General Summary:**
>
> Provides a full range of speech and language consultation services to school based personnel in support of students with communication difficulties. Provides a broad range of services encompassing identification, assessment, prevention and programming to address student needs in the classroom and other school environments. Supports the Manager, Special Programs in the efficient delivery of speech and language services to all Yukon public schools.

[6] The SL Consultants had been designated as members of the ST Group, which includes "positions requiring the continuous exercise of a discipline normally acquired through formal post-secondary education in the natural or physical sciences, including but not limited to … medicine and health".

[7] Excluded from that group are positions in which "the major focus is education and inclusion is more appropriate in the Education Group".

[8] The Union argued the described job fell within the description of the Education Group in the Job Evaluation Manual ("persons involved in developing and evaluating standards, programs and techniques … and administering educational and professional support programs"), and the specific sub-group of Consultant ("positions … where the primary focus is the evaluation and promotion of teaching techniques … and methods of instruction in specialized subject areas").

[9] Excluded from that group are "positions for which … there is no essential requirement for a teaching certificate, instructional diploma or degree in Education".

[10] The Union's position was that the SL Consultant position can be considered to meet the exclusion criteria for both groups. That being the case, the Board was asked to designate the group most suitable for the primary purpose of the occupation. In the Union's submission it was the EC Group.

[11] The Government argued that the ST Group designation was not only the "best fit" but it was also the only appropriate classification. The position does not meet the criteria for inclusion in the EC Group, the Government argued, because the SL Consultants are not responsible for implementing curriculum or for "recommending strategies or teaching techniques that impact upon the aggregate of the public school system". Further, they meet an exclusion criterion: it is not essential for these employees to hold a teaching certificate, instructional diploma or degree in education. They clearly meet the inclusion criteria for the ST group, as they have formal training in a medical/health field and their major focus is not education *per se*.

[12] The Board held that the "key rule" in making classification decisions is to consider the "similarity of positional responsibilities" within occupational groups. The Board held, at pp. 6-7:

> The real issue, in my view, in the context of the Plan's implied intent in establishing occupational groupings, is whether the work in this instance should be viewed as relatively generic speech pathology/language skills, which just happens to be focused upon students in a school setting, or a configuration of professional skills specifically applied to education such that it can reasonably be said that "the major focus is education' in terms of developing and evaluating educational programs and techniques, curriculum standards and methods of instruction in specified subject areas.
>
> I find that the whole of the job description supports the second scenario and that the subject positions meet the requirements to belong to the Education Group.

[13] The Board found the SL Consultants' focus upon individual students was not determinative. Their job description includes some responsibilities beyond assisting

individual students. The Board added, at p. 11, in support of the SL Consultants' inclusion in the EC Group:

> The suitability of the Education Group designation in the current case is supported by a comparison of the subject positions with the School Psychologist position, which confirms that what is normally thought of as a profession independent from education, can be legitimately placed into the Education Group, despite no education degree and a major focus on individuals combined with a consultant role in the system. Both positions assist individual students directly in their education endeavors, and as a major focus; but they also assist school personnel in the effective delivery of a particular professional service under the auspices of Special Programs, as a major focus.

[14] The Court considered three arguments made by the Government:

a) that the Board exceeded its jurisdiction by considering school psychologists as comparable when, by virtue of s. 5(3) of the *Public Service Regulations*, the Board is not entitled to consider any positions which are not official benchmark positions, and school psychologists are not benchmark positions;

b) that the Board exceeded its jurisdiction by disregarding the exclusion criteria of the Education Consultants classification; and

c) that the Board designation is an unreasonable interpretation of the application of the plan.

[15] The Court did not answer the first question:

> [34] As for the first ground of this judicial review, I need not decide that issue. But I would say I agree with PSAC's position that it was the government's submissions to the tribunal that introduced consideration of an inappropriate benchmark. And it is not as a result, in my view, available to a party who has done so to argue error on the tribunal by following the path of error that, in this case, the government's submissions introduced into the process.

[16] While concluding that the Board might reasonably have found the SL Consultants should be classified in the EC Group, the judge allowed the judicial review because the inclusion and exclusion criteria were not sufficiently addressed in the reasons. After briefly reviewing the Board's analysis, the judge held:

> [26] This analysis, with respect, is not complete.
>
> [27] The plan says, in terms of exclusions from the scientific and technical group, “the major focus is education and inclusion is more appropriate in the Education Group”. That requires, respectfully, a detailed analysis of inclusion and exclusion factors for both groups, and, specifically, inclusion and exclusion factors of the education group.
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> [28] This, in my view, was not undertaken by the tribunal. What the tribunal was faced with was two competing categories: “Scientific and Technical” and “Education”. The enabling language of these criteria set out both indicia of inclusion and indicia of exclusion. In my view, this tribunal fell into error, made an unreasonable decision, by focussing primarily on a partial and only a partial phrase of exclusion criteria of the Scientific and Technical group and did not focus on the entirety of the definition set out in both groups, both as to inclusion and exclusion. The partial phrase "focus is education" is not the test. The test is “major focus is education and inclusion is more appropriate in the Education Group”.
>
> [29] There is no analysis in the reason, respectfully, of it being more appropriate in the Education Group. Any such analysis would have to deal in some way with the exclusion aspect of the Education Group, specifically an exclusion which makes it inappropriate to be a member of that group if one does not possess a teaching certificate or an instructional diploma or a degree in education.
>
> [30] In one sense, the decision that had to be made was one group or another. **Any decision as to either group is within, perhaps, the general parameters of a reasonable decision.**
>
> [Emphasis added.]

[17] The Board’s decision was set aside despite that finding. The Court held:

> [31] Where this tribunal acted unreasonably, in my view, is its focus of analysis on one phrase of one criteria of exclusion in one group and virtually no analysis or assessment of the exclusion criteria set out in the other group in which it placed these individuals and exclusion analysis, which seems, on the face of it, to prohibit those individuals from being a member of that group.
>
> [32] Any analysis must be reasonable. And to be reasonable, in my view, must include a consideration of all indicia of inclusion and all indicia of exclusion. To focus on one partial aspect of one criterion as opposed to an analysis of all criteria is unreasonable.

Grounds of Appeal

[18] The Union says the Board committed no reviewable error when it concluded the appropriate occupational group designation of SL Consultants was the EC Group. It says the judge erred by failing to pay respectful attention to the reasons

offered or which *could be offered* in support of the Board's decision, and by failing to first seek to supplement before seeking to subvert them.

Analysis

[19] The *Act* contains strong privative provisions:

> 44 The decision of the classification appeal board binds the Government of the Yukon, the commission, the deputy head, and the employee.
>
> 45(1) Except as provided in this Act, every order, award, direction, decision, declaration, or ruling of the classification appeal board is final and shall not be questioned or reviewed in any court.

[20] The parties agree that deference is owed to the Board and on judicial review the onus was on the applicant to establish that the Board's decision was unreasonable. On this appeal, the question is whether the judge was correct in setting aside the Board's decision.

[21] The Union submits the judge fell into error by failing to consider the reasons that could have been given by the Board to justify its decision and by failing to determine whether the Board's reasoning, both implicit and explicit, was reasonable, contrary to the directions of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 S.C.R. 708, and *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405. In *Newfoundland Nurses*, Abella J., for the Court, wrote:

> [12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
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> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc,

> then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added by Abella J.]
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> (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

[22] That exercise – looking for apparent justification for the decision – is particularly important in a case such as this where the decision made is, in the words of the judge, "within, perhaps, the general parameters of a reasonable decision". The Union submits that because the Board's decision falls within a range of possible outcomes it should not have been set aside. It was open to the Board to find that the SL Consultants' position met the criteria for inclusion in either the EC or the ST groups; the position also met the criteria for exclusion from each group; and the allocation should hinge upon "fit" within the most appropriate group. It argues the Board implicitly found the exclusion criteria to be indicators of fitness, to be referred to for guidance, rather than mandatory conditions.

[23] It says the last proposition is clearly stated by the Federal Court of Appeal in *Public Service Alliance of Canada v. Canadian Federal Pilots Association,* 2009 FCA 223, [2010] 3 F.C.R. 219. In that case, the question before the Court was whether the Public Service Labour Relations Board ("PSLRB") can allocate an employee to an occupational group from which he or she is specifically excluded. The PSLRB sought to discharge its statutory duty by finding the best fit for the disputed positions, considering the primary duties attached to the positions in dispute, and those to which they were being compared. In doing so, the PSLRB found exclusions to be directory, not mandatory. Evans J.A. held:

> [69] … In my opinion, it was not unreasonable for the Board to have considered the group definitions as a whole, that is, their inclusive and their exclusive elements. As the Board found, it was not possible to allocate the positions to a group without running afoul of some aspect of the definitions.

[24] The Government says the judge correctly found the Board's analysis to be incomplete. The Board is said to have failed to explain why the EC Group is a better fit than the ST group for the SL Consultant position. The Government argues there

was inadequate consideration of the suitability of an ST designation and that the Board's decision cannot be supported without the significant reformulation of the type expressly disapproved of in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 54, [2011] 3 S.C.R. 654 [*A.T.A.*].

[25] The *A.T.A*. dealt with the court's ability to address issues not previously raised on appeal. The decision did not undermine, but rather re-emphasized the rule that deference requires a reviewing court to attempt first to supplement reasons. Even in relation to issues not argued, the Court held at para. 55: "When a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal. Instead, the decision should simply be upheld as reasonable."

[26] The Government argues that the Board wrongly concluded that "because the consultants are not confined to working on one-on-one situations this takes them out of the ambit of the Scientific and Technical group". That argument is founded upon a misapprehension. It was the Government's position before the Board that the SL Consultants should not be included in the EC Group because they are not responsible for implementing curriculum or recommending strategies or teaching techniques "that impact upon the aggregate of the public school system". It was in response to this argument, and in relation to the EC Group inclusion criteria, that the Board addressed both the therapists' systemic and student-specific roles. The Board held that, like school psychologists, SL Consultants play a role that includes a systemic consultant role as well as a major focus on individuals. The fact they play some systemic role was considered in concluding that they should be included in the EC Group.

[27] The Government does not pursue the argument that it was an error to place any weight upon the evidence with respect to other classification decisions. It argues, however, that the Board erred in placing some weight upon the fact that *school psychologists* are classified in the EC Group despite the fact they need not

have teaching certificates. The Government says it was wrong to believe psychologists need not have teaching certificates. The School Psychologist Position Description requires that school psychologists have "*Eligibility* for a Yukon Teaching Certificate". The Government suggests that is an "essential requirement for a teaching certificate, instructional diploma or degree in Education" for employment as a school psychologist.

[28] This argument was not made before the Board when comparable classification decisions were considered. The Union says "eligibility for a teaching certificate" is not equivalent to possession of a teaching certificate, instructional diploma or degree in Education. In any event, it argues, the fact other positions for which a certificate is not essential, such as Student Support Consultant, have been allocated to the EC Group is evidence of the fact the group's exclusion criteria are not and have not been considered to be mandatory.

[29] The evidence is that school psychologists must be *eligible* for a certificate but there is no essential requirement for a teaching certificate, instructional diploma or degree in Education in their job description. The *Teacher Certification Regulations*, O.I.C. 1993/046, describe the eligibility requirements. They were not considered by the Board or addressed by the judge on judicial review. In the circumstances, I am of the opinion the Government cannot establish the error alleged on appeal.

[30] In my opinion, the judge erred in setting aside the decision of the Board. The Board's reasons provide an intelligible and transparent justification for its decision. The Union argued the SL Consultants' position fell within the EC Group classification because its primary focus is the evaluation and promotion of teaching techniques and methods of instruction in specialized subject areas; and for that reason, the position was excluded from the ST Group. The Government argued for the SL Consultants' inclusion in the ST Group because they are involved in the continuous exercise of a discipline acquired through formal post-secondary education in medicine and health. It argued for their exclusion from the EC Group because they are not responsible for implementing curriculum or recommending strategies or

teaching techniques; and because it is not essential for them to hold teaching certificates. These inclusion and exclusion criteria – primary or major focus, exercise of a professional discipline, individual vs. strategic planning and professional teaching qualification – are all referred to in the Board's decision.

[31] The Board was clearly aware of the relevant criteria in coming to its conclusion that the *key rule* in making classification decisions is to consider the similarity of positional responsibilities within occupational groups. It was implicit in the decision that the exclusion criteria were not regarded as mandatory and that conflict in the exclusionary criteria ought to be addressed by looking for the best fit. That conclusion has been held to be a reasonable approach to a very similar regime in the *Canadian Federal Pilots* case. In light of the decision in that case, it certainly cannot be said to be unreasonable for the Board to find the inclusion and exclusion criteria to be indicia of appropriate allocation to occupational groups and not mandatory. That is particularly so where, as here, there is an express proviso in the classification plan that "Each group has been defined using criteria which *would indicate inclusion* in a particular group as well as criteria which *would indicate exclusion* from that group" and where it may be argued that the position is excluded from the two most appropriate groups.

[32] Application of the deferential approach to judicial review described in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, ought to have resulted in the dismissal of the application for judicial review. The reasonableness standard of review there enunciated requires us to consider "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (per Bastarache J. at para. 47).

[33] Having found the interpretation of the criteria by the specialized tribunal resulted in an outcome that was open to the Board, the judge should not have required a more expansive description of the manner in which the inclusion and exclusion criteria were addressed by the decision maker.

[34] The decision ought not to have been set aside on judicial review. I would allow the appeal with costs in this Court and in the Supreme Court and reinstate the August 20, 2013 decision of the Classification Appeal Board.

[35] **FRANKEL J.A.**: I agree.

[36] **TYSOE J.A.**: I agree.

[37] **FRANKEL J.A.**: The appeal is allowed, the order below is set aside, and the appellant is awarded costs in this Court and in the court below.

"The Honourable Mr. Justice Willcock"